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No. 91-1721

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and
TOMMY HAZOURI, in his official
capacity as Mayor of
the City of Jacksonville,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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June 26, 1992

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QUESTIONS PRESENTED

Respondents, CITY OF JACKSONVILLE, FLORIDA, and TOMMY HAZOURI, hereinafter referred to as "City," restate the question presented as follows:

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WHETHER AN ASSOCIATION CHALLENGING AN AFFIRMATIVE ACTION ORDINANCE MUST PLEAD AND PROVE INDIVIDUAL INJURY, WHICH IS SPECIFIC AND CONCRETE, AND NOT MERELY RELY ON A GENERALIZED GRIEVANCE, TO SATISFY ITS CONSTITUTIONAL STANDING?

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STATEMENT OF THE CASE

The Petitioner, NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, hereinafter referred to as "AGC", in its statement of the case, omits highly relevant information regarding the precise nature of the challenged affirmative action program.

The challenged City ordinance is directed at increasing the participation of minority business enterprises in government procurement. The legislative findings in Section 126.601 state that past inequities have existed in the awarding of contracts to minority business firms and these enterprises have been disadvantaged in their participation in the general welfare of the City and City expenditures. Petitioner's Appendix at 14, said Appendix hereinafter referred to as ("A:_").

The ordinance establishes an affirmative action program allocating ten

percent of certain contracting opportunities for minorities. The ordinance does not dictate a mandatory quota requiring a certain number of contracts to be let. In fact, Sections 126.604(a)(4), 126.604(b)(3), 126.605(a)(4) and 126.605(b)(3) declare that mathematical certainty is not required in reaching the goals. (A:15-21) Moreover, Section 126.608 contains a discretionary provision whereby the chief purchasing officer upon evidence of, among other things, the unavailability of minority businesses and the City's cost in meeting the goals, may waive the program's application. (A:24)

Amended Section 126.613 contains a specific durational period of five years from October 1, 1988. (A:26-27) Upon its expiration, the City Council may reenact the ordinance if the disparity in minority business participation has not been remedied. Id.

The AGC argues that its complaint alleges that non-minority members of the association otherwise eligible to compete for City contracts are restricted from doing so because of their race. Petition for Writ of Certiorari at 10-11, said petition hereinafter referred to as ("Petition"). In particular, the AGC argues that numerous non-minority members of the AGC would have bid on designated contracts but for the affirmative action requirements imposed by the ordinance. Id. The AGC claims that the City did not challenge these allegations below. This is a misstatement of the record. The City in its answer specifically denied these allegations. And, the record is devoid of any evidence supporting such allegations.

On the prior appeal of this case, the Eleventh Circuit, in **Northeastern Florida Chapter v. Jacksonville, Florida**, 896 F.2d 1283 (11th Cir. 1990), concluded that a preliminary injunction was not

warranted in that the record below was inadequate to sustain equitable relief. The Eleventh Circuit held that the AGC had failed to make the requisite showing of irreparable injury in that the association failed to bring forth representatives who could assert injury resulting from the City's enforcement of the affirmative action program. No further proof in support of the AGC's standing was offered from the filing of the complaint until the district court's rendering of the order granting summary judgment. Despite the Eleventh Circuit's clear guidance on this issue, the AGC failed to provide the district court with additional facts supporting its injury.

Since no evidence was received subsequent to the former appeal, the Eleventh Circuit, on the second appeal, vacated the summary judgment entered by the district court and directed the dismissal of the case without prejudice. The

Eleventh Circuit held that the AGC lacked constitutional standing in the absence of any demonstration of injury. **Northeastern Florida Chapter v. City of Jacksonville, Florida**, 951 F.2d 1217 (11th Cir. 1992).

SUMMARY OF THE ARGUMENT

The AGC has not provided a basis for the Supreme Court to accept review of this case. It has failed to demonstrate that the Eleventh Circuit decisions in **Northeastern Florida Chapter v. City of Jacksonville**, 951 F.2d 1217 (11th Cir. 1992); **Cone Corp. v. Florida Dept. of Transportation**, 921 F.2d 1190 (11th Cir. 1991); and **S.J. Groves & Sons, Co. v. Fulton Co.**, 920 F.2d 752 (11th Cir. 1991), conflict with Supreme Court precedent. The Eleventh Circuit declined jurisdiction of this constitutional challenge to the City's affirmative action ordinance in accordance with Article III requirements.

Article III of the Constitution requires a litigant demonstrate actual case and controversy before an adjudication on the merits. The AGC association failed to satisfy the essential element of injury. The complaint did not allege an injury-in-fact suffered as a result of the City's

implementation of the ordinance. The AGC further failed to carry its burden of proof on the motion for summary judgment in that no affidavit proving a past instance of injury was provided to the court. There was also no showing that the ordinance commands future unconstitutional conduct.

Accordingly, the Eleventh Circuit properly refrained from rendering an advisory opinion on the ordinance's constitutionality in the absence of Article III jurisdiction.

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT, IN NORTHEASTERN FLORIDA CHAPTER v. CITY OF JACKSONVILLE, 951 F.2d 1217 (11th Cir. 1992), CORRECTLY HELD THAT AN ASSOCIATION CHALLENGING AN AFFIRMATIVE ACTION ORDINANCE MUST PLEAD AND PROVE INDIVIDUALIZED INJURY, WHICH IS SPECIFIC AND CONCRETE, AND NOT MERELY RELY ON A GENERALIZED GRIEVANCE, TO SATISFY ITS CONSTITUTIONAL STANDING IN ACCORDANCE WITH SUPREME COURT PRECEDENT.

The Eleventh Circuit in **Northeastern Florida Chapter v. City of Jacksonville**, 951 F.2d 1217 (11th Cir. 1992); **Cone Corp. v. Florida Dept. of Transportation**, 921 F.2d 1190 (11th Cir. 1991); and **S.J. Groves & Sons, Co. v. Fulton Co.**, 920 F.2d 752 (11th Cir. 1991), faithfully adhered to the traditional requirements of constitutional standing.

These decisions do not conflict with any decision of the United States Supreme Court or the Ninth Circuit Court of Appeals cases cited by the AGC.

The fundamental predicate for standing is the demonstration of a threatened injury. Article III, Section 2 of the **United States Constitution** limits the exercise of judicial power to actual cases and controversies. To establish Article III standing, a plaintiff must demonstrate actual or threatened injury, fairly traceable to the challenged action, and redressable by a favorable decision. **Valley Forge Christian College v. Americans for Separation of Church & State, Inc.**, 454 U.S. 464, 472 (1982). In **Warth v. Seldin**, 422 U.S. 490 (1975), the Court stated:

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case for controversy' between himself and the defendant within the meaning of Article III. This is the threshold question in every

> federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.

Id. at 498-499.

Article III demands that a plaintiff clearly and specifically set forth facts sufficient to satisfy judicial intervention. **Warth v. Seldin, supra,** 422 U.S. 490, 501. There is a necessity that a litigant plead a "distinct and palpable" injury, that is, he has suffered an "injury-in-fact." **Whitemore v. Arkansas,** 495 U.S. 149, 155 (1990). Allegations of possible future injury do not constitute "injury-in-fact." **Diamond v. Charles,** 476 U.S. 54 (1986). The injury must be real and immediate and not conjectural or hypothetical. **Id.**

An association may have standing under Article III to secure judicial relief. **Warth v. Seldin, supra** 422 U.S. 490, 511. Like any other litigant, an association is required to set forth "injury-in-fact" to at least one of its members resulting from the challenged action. Id. It is essential that a court decline jurisdiction in the absence of allegations of such individualized injury. **Id.**

AGC's complaint below consists solely of bare conclusions to the effect that the AGC has been injured. The deficiency of the allegations is clearly apparent in that it does not meet minimal standing requirements. No distinct or palpable injury has been pled. The complaint fails to identify any personal injury sustained by an AGC member sufficient to confer the "case and controversy" threshold. The complaint also fails to allege that a specific contract

was lost due to the City's implementation of the affirmative action ordinance.

The plaintiff bears the burden of presenting specific concrete facts demonstrating particularized injury. **Warth v. Seldin, supra** 422 U.S. 490, 508. The Supreme Court, in **Lujan v. Defenders of Wildlife**, __ U.S. __, 1992 WL 125406 (June 12, 1992), recently reiterated the principle that the party invoking federal jurisdiction has the burden of proof on the elements required to sustain its standing. A court may not embellish deficient allegations of standing to create jurisdiction. **Whitemore v. Arkansas, supra** 495 U.S. 149, 155-156. The allegations must be true and capable of proof at trial. **U.S. v. SCRAP**, 412 U.S. 669, 689 (1973).

The **Lujan** Court summarized the evidentiary requirements necessary to establish injury, as follows:

> [T]hey are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of litigation . . . At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . In response to a summary judgment motion, however, the plaintiffs can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts" . . .

Lujan v. Defenders of Wildlife, supra ____ U.S. ____, 1992 WL 125406 at 4. (citations omitted). A court has the authority to allow an amendment to a complaint or submission of a supplemental affidavit to support standing. **Warth v. Seldin, supra**, 422 U.S. 490, 501.

The AGC failed to satisfy the weighty burden of proof required to establish constitutional standing under Article III and to maintain this lawsuit. Despite the fact the AGC did not plead clear instances of past injury, the court

could have considered any instances of injury submitted with AGC's motion for summary judgment. No such evidence was submitted by the AGC to fulfill its evidentiary burden on the summary judgment motion.

The AGC admits that the record does not contain any proof of standing beyond the allegations of the complaint but contends that the City did not raise the issue in the trial court. (Petition at 11 n. 2 and 16 n. 3) The AGC had the opportunity to submit affidavits prior to the court's decision on the motion for summary judgment. The AGC failed to do so. Accordingly, the Eleventh Circuit properly dismissed the complaint because the AGC did not provide "specific facts" supporting the essential element of injury-in-fact which could serve as a basis for constitutional standing.

The AGC argues that the Eleventh Circuit holdings in **Northeastern Florida**

Chapter v. City of Jacksonville, supra, 951 F.2d 1217; **Cone Corp. v. Florida Dept. of Transportation, supra,** 921 F.2d 1190; and **S.J. Groves & Sons, Co. v. Fulton Co., supra,** 920 F.2d 752, rigidly require a plaintiff challenging the constitutionality of an affirmative action ordinance to establish standing only by demonstrating that a specific contract was lost on account of race.[1] (Petition at 16-17) This characterization of these decisions is inaccurate. They do not create a new mechanical bright line test for standing but are consistent with the Supreme Court view.

The Eleventh Circuit, in **Cone,** held that the contractors did not satisfy Article III standing in that they failed to

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1. The Eleventh Circuit, in **Northeastern Florida Chapter v. Jacksonville, Florida, supra,** recognized that noneconomic injury also satisfies Article III standing. **See U.S. v. SCRAP, supra,** 412 U.S. 669. The AGC's complaint does not allege such harm.

show either that they had been denied any contracts on the basis of race or that the operation of the Florida statute at issue would necessarily result in an equal protection violation. After reviewing the relevant Supreme Court decisions, the Eleventh Circuit concluded that there are two types of allegations which may be used to demonstrate particularized injury necessary to meet Article III standing. **Id.** at 1205 n. 48. Plaintiff may assert specific past instances of injury, or that a challenged ordinance mandates future unconstitutional conduct. **Id.**

The **Cone** Court found that no facts existed to support the allegation of past injury because no contract was presented demonstrating denial of an award on the basis of race. **Id.** at 1205-1206. The Eleventh Circuit also reviewed the subject statute and concluded that the program did not require future denial of equal protection:

> For us to find a denial of equal protection under this scenario, we would have to say that the statute plainly requires the Secretary to deny equal protection, this is, a Florida court interpreting Florida law, could not reasonably conclude otherwise, and that the regulations -- to the extent that they allow the Secretary to exercise discretion -- are a nullity. We conclude, on the contrary, that Section 339.0805 on its face does not direct the secretary to violate the fourteenth amendment; consequently, the statute, itself, does not provide proof that the Secretary is likely to deny plaintiff's equal protection of the laws in letting highway contracts.

Id. at 1208.

In **S.J. Groves,** the plaintiff claimed, among other things, injury from a lost opportunity to compete equally with contractors for county projects. **Id.** at 757-758. The Eleventh Circuit concluded that the claim of lost opportunity to compete on an equal basis with other bidders was not a cognizable Article III injury in that the questioned law did not

prevent the plaintiff from competing. **Id.** Accordingly, the case was dismissed for lack of standing since no past or likely future injury was proven.

The Eleventh Circuit also affirmed the ruling in **Capeletti Bros., Inc. v. Broward County**, 738 F.Supp. 1415 (S.D. Fla. 1990), aff'd 931 F.2d 903 (11th Cir. 1991). The district court ruled that the plaintiffs had no standing to maintain their lawsuit because they lacked injury-in-fact. **Id.** at 1416. The plaintiffs failed to specify any particular project which caused them harm. **Id.** at 1417. Absent was any allegation that the plaintiff submitted a bid that was rejected. **Id.** After analyzing the ordinance, the Court determined that the subject program was not mandatory but rather a set of guidelines. The Court noted the insufficiency of the injury allegation:

> Armed with the Supreme Court decision, the plaintiffs come to court and ask the undersigned, in effect, to set itself up as a constitutional board of inquiry and issue an advisory opinion on the constitutionality of the county's program. Especially when a case presents an issue of constitutional law, the court will decline to cull the statute books when no specific factual situation is presented. Under Article III, § 2 of the Constitution, this court can only decide cases and controversy.

Id. at 1418.

The AGC argues that the Ninth Circuit decision in **Coral Const. Co. v. King County**, 941 F.2d 911 (9th Cir. 1991), is in conflict on the issue of standing with the Eleventh Circuit cases reviewed above. (Petition at 12-14) The opinions are, in fact, completely harmonious with each other.

The Ninth Circuit reviewed the King County ordinance and expressly accorded deference to the Eleventh Circuit decisions in **Cone** and **S.J. Groves.** The specific ruling in **Coral Const.** turned upon the

application of the particular facts distinguishing the cases. In contrast to **Cone**, the Court stated that the complaint contained sufficient factual allegations that the Plaintiff would compete for future contracts. **Id.** at 929. Consistent with **S.J. Groves**, however, the Court concluded that such allegations of injury were insufficient because it was too speculative to presume that the plaintiff would be a low bidder but lose an award. **Id.** at 929-930.

The Ninth Circuit held that the plaintiff demonstrated standing in light of the specific ordinance at issue which dictated future unconstitutional conduct. The ordinance contained a preference method which conferred an automatic competitive advantage to women. This showing of unequal competition satisfied the future threatened injury requirement for Article III standing. **Id.** at 930. See **Associated General Contractors of California, Inc. v.**

Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991).[2]

Unlike the King County ordinance, the AGC has not demonstrated that the ordinance herein commands unconstitutional conduct by the City. In sharp contrast, the ordinance vests discretion with the City's chief purchasing officer. Section 126.608. (A:24) The City's ordinance is similar to the Florida statute in **Cone** as the Eleventh Circuit found on the appeal herein. Moreover, the record does not indicate a single past instance of unconstitutional enforcement of the ordinance.

The Eleventh Circuit opinions are also consistent with the Supreme Court's application of the Article III standing doctrine. AGC relies heavily on **Village of**

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2. It should be highlighted that the **Coral Const.** plaintiff established past injury-in-fact under the MBE component of the ordinance in that its low bid was rejected because of enforcement of the automatic bid preference. **Id.** at 914.

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), to support the proposition that the failure to specify a particular project lost as a result of race is not fatal to a plaintiff's standing. (Petition at 20-21) A close examination of the decision reveals that the definite injury threshold was satisfied therein.

The **Village of Arlington Heights** Court found that an individual plaintiff demonstrated injury by testifying that if a certain project were constructed, he would move there since it was closer to his job. **Id.** at 264. If the Court granted the requested relief, there was thus a substantial probability of redress for the injury. **Id.** In addition, the Court noted that the non-profit developer corporation expended thousands of dollars in furtherance of the development and had a concrete interest in making low cost housing available. **Id.** at 262-263.

The AGC further relies on the Court's decision in **University of California Regents v. Bakke**, 438 U.S. 265 (1978). (Petition at 22-23, 26) However, the **Bakke** case did not expand Article III standing.[3] The Court found that Bakke had suffered "injury in fact" in that he would have been admitted to either the 1973 or 1974 entering class in the absence of the special admissions program. **Id.** at 280. The Court expressly acknowledged that the petitioner had conceded the existence of "injury" and that this fact was reflected in the record. **Id.** at 281 n. 14. The Court stated <u>in dicta</u> that standing was established by the mandatory nature of the

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3. In **Warth v. Seldin, supra,** the Court held that an association lacked standing in that it failed to specify a particular project precluded by a zoning ordinance. Id. at 516-517. The Court also found that no facts were alleged showing a substantial probability affordable housing would be obtained in the absence of the ordinance. Id. at 504. In contrast, in **City of Richmond v. J.A. Croson Co.**, 488 U.S. 469 (1989), Article III standing was clearly present because a contractor had suffered a distinct and concrete injury when it failed to obtain a contract but for a set aside ordinance.

special program where white disadvantaged students were precluded from consideration. **Id.**

Unlike the cases of **Village of Arlington Heights** and **Bakke**, the AGC failed to demonstrate that the City's affirmative action ordinance necessarily precludes any of its members from receiving City contracts. The program provides for discretionary application. Moreover, even assuming arguendo that the ordinance is struck down, it is too speculative to presume that an AGC member would benefit by the award of City contracts.

The Supreme Court has refrained from ruling on the constitutionality of a legislative act unless obligated to do so in the context of a case and controversy raised by a litigant with a direct stake in the outcome. **Valley Forge College v. American United, supra**, 454 U.S. 464, 474. The Court, in **Whitemore v. Arkansas, supra**, 495 U.S. 149, stressed that Article III

case and controversy is imposed by the Constitution and that the Court is powerless to expand its jurisdictional role to hear certain cases even in the furtherance of good public policy. **Id.** at 161. The presence of a disagreement, however acrimonious, does not support a basis for Article III jurisdiction. **Diamond v. Charles, supra,** 476 U.S. 54, 62. A party has no standing to simply complain that the government is violating the law. **Id. Allen v. Wright**, 468 U.S. 737, 755-756 (1984). If this were to the contrary, the judiciary would have the function of deciding abstract questions of public concern even though the other branches of government might be more competent to handle generalized grievances. **Warth v. Seldin, supra**, 422 U.S. 490, 500.

The AGC treats Article III jurisdiction as a troublesome hurdle to overcome in its quest to overturn the City's affirmative action ordinance. The

AGC's generalized grievance in opposition to the ordinance does not obviate the constitutional necessity for the proper showing of standing. The Eleventh Circuit correctly dismissed the lawsuit without prejudice in the absence of a demonstration of actual case and controversy. The Court's application of Article III standing recognized such a result was required in face of the present record's inadequacy.

The AGC further concedes that the remaining appellate cases it cites have not considered the identical issue presented by the Petition for Writ of Certiorari. (Petition at 12) As demonstrated above, the petition should be denied because the Eleventh Circuit in **Northeastern Florida Chapter v. City of Jacksonville, supra,** 951 F.2d 1217; **Cone v. Florida Dept. of Transportation, supra,** 921 F.2d 1190; and **S.J. Groves & Sons, Co. v. Fulton Co., supra,** 920 F.2d 752, properly followed

Supreme Court precedent.[4]

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4. The Eleventh Circuit below vacated the district court's grant of summary judgment in favor of the AGC. The district court's decision was based upon its erroneous reading of City of Richmond v. J. A. Croson, supra, 488 U.S. 469, as restricting the defense of an affirmative action program to evidence which was physically before a legislative body. This requirement that a certain type legislative procedural fact-finding precede the enactment of an ordinance is an unwarranted encroachment into the law-making process. The City should have been permitted to present a substantive defense with the presentation of any relevant evidence supporting the legislation.

Moreover, the district court improperly shifted the ultimate burden of proof to the City to prove the constitutionality of the ordinance. This conflicts with the established rules of American jurisprudence requiring that the ultimate burden of proving discrimination remain with the plaintiff at all times. Johnson v. Transportation Agency, 480 U.S. 616, 626-627 (1987) citing Wygant v. Jackson Board of Education, 476 U.S. 267, 277-278 (1986); Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642 (1989).

The imposition of strict scrutiny review should have not changed the proper allocation of proof. Even though strict scrutiny review makes the AGC's constitutional challenge easier by reducing the quantum of evidence necessary to overturn the ordinance, the AGC should not have been permitted to present absolutely no evidence to meet its burden. The City went well beyond mere articulation of a nondiscriminatory rationale for its implementation of the affirmative action program.

Accordingly, the district court's summary judgment in favor of AGC should have been vacated in any event. On the appeal, however, the Eleventh Circuit did not reach the merits of these substantive arguments. The Court dismissed, without prejudice, the AGC challenge on the issue of standing.

CONCLUSION

For all of the above reasons, the City respectfully requests that the United States Supreme Court deny this Petition for Writ of Certiorari.

Respectfully submitted,

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